To sum up, it is my view and I find as a fact, that in preparing the drawings on which this claim is based the plaintiff's engineers copied such portions from the P.W.D. drawings that they desired to include in their own drawings and that certain changes and additions were made. With the exception of some of the drawings, they did not make exact copies of the P.W.D. drawings but I am satisfied that they made substantial copies from them. In the circumstances, I hold that the plaintiff's drawings were not original literary work within the meaning of the Enactment so as to qualify for a copyright in them.

The action is therefore dismissed with costs.

Action dismissed.

Solicitors: *Skrine & Co.*

RE ONKAR SHRIAN

[O.C.J. (Choor Singh J.) August 2, 1969]
[Singapore — Originating Motion No. 24 of 1969]

Criminal Law and Procedure — Foreigner arrested in Singapore for offence committed in West Malaysia — Application for return of foreigner to Malaysia opposed — Magistrate's court adjourning proceedings for applicant to apply for habeas corpus — Criminal Procedure Code (Cap. 132), ss. 54 & 375.

Habeas corpus — Applicant on bail and not in actual custody — Whether court has jurisdiction to make order asked for.

Extradition Act, 1968, ss. 12(1) and 37 — Constitution of Malaysia, art. 5 as applicable to Singapore under the Republic of Singapore Independence Act, 1965, s. 6, read with Criminal Procedure Code (Cap. 132), s. 375.

A person at large on bail is not so restrained of his liberty as to be entitled to the writ of *habeas corpus* which for centuries has been issued only when the applicant is in illegal confinent. It follows therefore that if a person is not detained in custody he is not entitled to a writ of *habeas corpus*. A person on bail cannot by any stretch of imagination be said to be detained in custody and is therefore not entitled to a writ of *habeas corpus*.

In this case the learned magistrate was wrong in adjourning the proceedings to a later date to enable the applicant to apply for *habeas corpus*. The magistrate should have either made an order discharging the applicant or an order for his return to Malaysia. As the magistrate did not make any such order and as the proceedings in the magistrate's court had not been concluded and the applicant was on bail, he had no means of challenging the validity of those proceedings.

Cases referred to:—

(1) *Zahir Ahmad* v. *Ganga Prasad & Ors.* A.I.R. 1963 Allahabad 4.

(2) *Ram Manohar Lohia & Ors.* v. *State of U.P. & Ors.* [1968] Cr.L.J. 281.

(3) *Babulal Parate* v. *State of Maharashtra* A.I.R. 1961 S.C. 884.

(4) *Cox* v. *Hakes* (1890) 15 App. Cas. 506.

(5) *Barnardo* v. *Ford* [1892] A.C. 326.

(6) *Ex parte Corke* [1954] 2 All E.R. 440.

(7) *R.* v. *Spilsbury* [1898] 2 Q.B. 615.

(8) *Re Isbell* [1930] 1 D.L.R. 393.

(9) *Ex parte Seriesky* (1912), 10 D.L.R. 612.

(10) *Re Bhagwan Singh* (1914), 17 D.L.R. 63.

(11) *Verrault* v. *Lachane* [1929] 2 D.L.R. 900.

ORIGINATING MOTION.

David Marshall for the applicant.

Lim Cheng Pah (Deputy Public Prosecutor) for the respondent.

Choor Singh J.: This is an application under paragraphs (b) and (c) of section 375 of the Criminal Procedure Code (Cap. 132) for a writ of *habeas corpus*.

The facts according to the applicant's affidavit, are that the applicant, who is a foreigner, was arrested in Singapore at his hotel by the police on 17th July 1969 at 3 a.m. without a warrant of arrest, for an offence alleged to have been committed in Kuala Lumpur. He was produced before the ninth magistrate's court in Singapore on the same day and there he learnt that a warrant for his arrest purportedly issued by the Kuala Lumpur sessions court had arrived in Singapore at 8.30 a.m. that day. It is alleged that a little later this warrant was endorsed by a Singapore magistrate and that the said warrant bears no authentication of any shape or form. At 4 p.m. the same day the applicant was released on cash bail in the sum of $5,000 and the proceedings were adjourned until 3 p.m. the following day. On 18th July 1969 at 3 p.m. the applicant appeared in the ninth magistrate's court where the Deputy Public Prosecutor made an application to the court to order the return of the applicant to Malaysia under the provisions of section 54 of the Criminal Procedure Code. This application was opposed by counsel for the applicant on several grounds whereupon the ninth magistrate's court adjourned the proceedings to 1st August 1969 to enable the applicant to apply for *habeas corpus*.

The application is "for an order that a writ of *habeas corpus* be issued against the respondent* to produce before this honourable court the applicant being taken and detained under custody of the respondent and thereafter released on bail, together with the day and cause of his being taken and detained, to undergo and receive all and singular such matters and things as the honourable court shall then and there consider of concerning him in his behalf, on the grounds following", and there are set out six grounds on which it is alleged

* 9th Magistrate, Singapore.

that "the continued detention" of the applicant is unlawful. It is however not in dispute that the applicant is now on bail.

Section 375 under which the application is made reads as follows:—

"375. Any person:—

(a) who is detained in any prison within the limits of Singapore on a warrant of extradition under any law for the time being in force in Singapore relating to the extradition of fugitive offenders; or

(b) who is alleged to be illegally or improperly detained in public or private custody within such limits; or

(c) who claims to be brought before the court to be dealt with according to law,

may apply to the court for a writ of *habeas corpus*."

The contention of Mr. David Marshall, learned counsel for the applicant, before me, is that as the affidavit of the applicant discloses that the entire proceedings in the ninth magistrate's court are void and without jurisdiction the applicant is entitled to an order *nisi*. What is alleged by the applicant in his affidavit may or may not be true. As this is an application for an order *nisi*, I am at this moment not concerned with the merits of the application. The only issue before me, at this stage, is whether or not this court has jurisdiction to make the order asked for when the applicant is on bail and is not in actual custody.

Mr. Marshall submits that this court has jurisdiction to make an order *nisi* even when an applicant is on bail and has cited two cases in support of his submission. The first one is a decision of the Allahabad High Court in *Zahir Ahmad* v. *Ganga Prasad & Ors.*[1] in which it was held that the fact that a person has been granted bail does not amount to his being set at liberty and that although on bail he can present an application for a writ of *habeas corpus*. Jagdish Sahai J. who delivered the judgment of the court, observed at page 9:—

"..... The law as to cases in which a writ of *habeas corpus* can be moved has been stated in paragraphs 41, vol. XI, *Halsbury's* Laws of England, Simonds Edn., at page 24 in the following words:—

'The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Where the detention of an individual is under process for criminal or supposed criminal causes the jurisdiction of the court and the regularity of the commitment may be inquired into. Where the restraint is imposed on civil grounds under claim of authority, the legal validity of that claim may be investigated and determined, and where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, those claims may be inquired into on the return to a writ of *habeas corpus*, and the custody awarded to the proper person. In other cases, where the personal freedom of an individual is wrongfully interfered with by another, the release of the former from the illegal detention may be effected by *habeas corpus*. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*.'

We have already examined the various provisions occurring in the Code of Criminal Procedure relating to bail and release on bail and it is clear from them that whereas a person released on bail is not in physical confinement, he still remains under the control of the court and that persons, who are his sureties, are only the agents of the court. For these reasons it appears to us that even a person who has been temporarily let out on bail but still on trial, can present an application for a writ of *habeas corpus*. We, therefore, overrule the preliminary objection made by the learned Additional Government Advocate ....."

The second case cited by Mr. Marshall is also a decision of the Allahabad High Court and is to be found in *Ram Manohar Lohia & Ors.* v. *State of U.P. & Ors.*[2] In this case the applicants had been arrested by the police on certain charges and were confined as "under-trial prisoners" in the district jail of Agra. They petitioned the High Court for a writ of *habeas corpus*. Before their petition could be heard they were released from jail on their furnishing personal bonds of Rs. 200 each. At the hearing of their petition for a writ of *habeas corpus*, a preliminary objection was raised by counsel for the State who contended that as the petitioners had been released from jail, no writ of *habeas corpus* could be issued. The court in overruling this objection, observed at page 284:—

"..... On behalf of the State the learned Govt. Advocate raised a preliminary objection to the hearing of the petition. He urged that since the petitioners have been released from jail their petition has become infructuous and no writ of *habeas corpus* can now be issued. The objection is plainly untenable. The prisoners have been released on their furnishing personal bonds as required by the order of the Sessions Judge of Agra. The release has not, therefore, restored the prisoners to their liberty and they are subject to the restraint of the bonds that they have furnished and may again lose the limited freedom granted to them on breach of the conditions of the bonds. In the case of *Babulal Parate* v. *State of Maharashtra*, AIR 1961 S.C. 884 the Supreme Court had before it a petition under Article 32 of the Constitution praying amongst other things for a writ of *habeas corpus* by a petitioner who was released on bail by the trying Magistrate after the proceedings pending against him had been stayed by the Supreme Court, but the Supreme Court did not, on account of the release of the petitioner, treat the petition as infructuous but disposed of it on merits after a determination of the questions raised in the petition. The question whether a person who has been released on bail can present a petition for a writ of *habeas corpus* was specifically raised before a Division Bench of this court in *Zahir Ahmad* v. *Ganga Prasad* [1962] All L.J. 654: AIR 1963 All 4 and it was held that such a person remains under the control of the court and notionally in the custody of the court and he can therefore present a petition for a writ of *habeas corpus*. The learned Government Advocate sought to distinguish these cases on the basis that the petitioners therein had been released on bail whereas the petitioners in the instant case have been released only on their executing personal bonds. This cannot, however, be any basis for distinction. A personal bond, as a condition of release, involves restrictions on liberty just as bail does, and if a person already on bail may present a petition for a writ of *habeas corpus* or a person released on bail subsequent to the presentation of such a petition may have his petition decided on merits, there appears

to be no reason why a person who has been released on his furnishing a personal bond may not present a petition, or a person, upon his release on furnishing personal bond subsequent to the presentation of a petition for *habeas corpus* may not obtain a decision on the questions raised in his petition, if he is otherwise entitled to do so. The preliminary objection must, therefore be overruled and the petition must be decided on merits ....."

Mr. Marshall referred to the case of *Babulal Parate* v. *State of Maharashtra*[3] which is mentioned in the above passage and pointed out that it is a decision of the Supreme Court of India and is entitled to the highest respect. I have read very carefully the full judgment in that case and I find that it does not deal with *habeas corpus* at all. The expression *"habeas corpus"* is not even mentioned in the judgment and I cannot see how the decision in that case can be said to be an authority for the contention that a person on bail is entitled to a writ of *habeas corpus*.

Although the two decisions of the Allahabad High Court which have been cited to me are not binding on me, they are entitled to the highest respect and I have given them the most careful consideration. But I regret to say that I am not at all convinced of the correctness of these decisions. It appears to me that the learned judges who decided these two cases have clearly moved away from the scope of the writ of *habeas corpus*. They have ruled that a person on bail is entitled to a writ of *habeas corpus* which seems to me to be clearly wrong because a person at large on bail is not so restrained of his liberty as to be entitled to the writ which for centuries has been issued only when the applicant is in illegal confinement.

The writ of *habeas corpus* is of English origin and to ascertain its scope we have to look at the English authorities. In Volume 11 of *Halsbury's* Laws of England, 3rd Edition, the writ is described and its scope set out very clearly at page 24. It is stated that the writ is a prerogative process of securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. By it the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on *habeas corpus* is not, however an acquittal nor may the writ be used as a means of appeal. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Where the detention of an individual is under process for criminal or supposed criminal causes the jurisdiction of the court and the regularity of the commitment may be inquired into. Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by *habeas corpus*. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*.

In *Short & Mellor's* Practice on the Crown Side, second edition, the writ of *habeas corpus* is described at page 305, as follows:—

"This great constitutional remedy, for all manner of illegal confinement, is a high prerogative writ, and at common law issues out of the King's Bench Division not only during the sittings, but also in vacation. It is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained, and extends to all cases of illegal imprisonment whether claimed under public or private authority."

and at page 309:—

"The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R.* v. *Barnardo* [1892] A.C. 326, Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed."

In *Cox* v. *Hakes*[4] Lord Halsbury L.C. said that the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.

In *Barnardo* v. *Ford*[5] a case decided by the House of Lords, Lord Herschell said at page 339:—

"The very basis of the writ is the allegation and the *prima facie* evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody."

And in the same case Lord Watson said, at page 334:—

"The remedy of *habeas corpus* is ..... intended to facilitate the release of persons actually detained in unlawful custody ..... and it is the fact of detention and nothing else which gives the court its jurisdiction."

At page 37 of Volume 11 of *Halsbury's* Laws of England, 3rd Edition, under paragraph 65 which is headed "Who is entitled to apply for a Writ" it is stated that "the person illegally imprisoned or detained in confinement without legal justification is both at common law and by statute, entitled to apply for a writ of *habeas corpus*, but it is not essential that the application should proceed directly from him." There can be no doubt at all as to the meaning of the expression "illegally imprisoned or detained in confinement." It clearly means physical detention.

Section 376 of the Criminal Procedure Code which lays down the procedure for making an application for a writ of *habeas corpus* mentions only two types of applications, namely, an application by a person detained on a warrant of extradition and an application by a person who is alleged to be illegally or improperly detained. Dr. Mallal in his learned commentary on the Criminal Procedure Code, Fourth Edition, has the following comment on section 376 at page 529:—

> "*Procedure* — The application must be supported by an affidavit showing that the accused is in actual custody as it is only under this circumstance that an application by way of *habeas corpus* can be made."

That illegal physical detention is the basis of jurisdiction in *habeas corpus* is apparent from the very wording of the writ which requires the person to whom it is addressed to produce the body of the person named therein who is "taken and detained in your custody, as is said, together with the day and cause of his being taken and detained, to undergo and receive all and singular such matters and things as the court shall then and there consider of concerning him in this behalf." The words I have quoted are from common law writ but the statutory form of the writ of *habeas corpus* which is Form No. 55 in Schedule B of our Criminal Procedure Code is in identical terms and reads as follows:—

> "LV. — WRIT OF *HABEAS CORPUS*
> IN THE HIGH COURT IN SINGAPORE
>
> To the Commissioner of Prisons or the Officer in in Charge of (name of mental hospital or the place where the person is detained in custody) or to (name of person).
>
> We command you that you have in the High Court immediately after the receipt of this our writ the body of being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as the said court shall then and there consider of concerning him in his behalf; and have you there then this our writ.
>
> Dated this day of 19 .
>
> (Seal) Registrar"

It will be seen that the writ has to be addressed to someone who has actual physical custody of the person who is alleged to be detained illegally. It follows therefore that if a person is not detained in custody he is not entitled to a writ of *habeas corpus*. A person on bail cannot by any stretch of imagination be said to be detained in custody and is therefore not entitled to a writ of *habeas corpus*.

There is further support for this view if one looks at article 5(2) of the Constitution of Malaysia in its application to the Republic of Singapore under section 6 of the Republic of Singapore Independence Act, 1965. This reference is relevant because it is stated that the application for the writ is made under the said article 5 as read with section 375 of the Criminal Procedure Code of Singapore. Article 5(2) of the Constitution of Malaysia reads as follows:—

> "(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and unless satisfied that the detention is lawful shall order him to be produced before the court and release him."

I have no doubt at all that "unlawfully detained" in article 5(2) of the Constitution of Malaysia means physically detained and that "release" in the said article means release from physical detention.

It must also be appreciated that the writ of *habeas corpus* is a writ of right and not a writ of course. This has been made clear by Lord Goddard C.J. in *Ex parte Corke*[6] where he said:—

> "..... It has always been the law, since it was laid down by Wilmot, J., in giving his opinion on the writ of *habeas corpus*, in answer to the question proposed to the judges by the House of Lords in 1758, that a writ of *habeas corpus* is a writ of right and not a writ of course: See *Wilmot's* Notes of Opinions and Judgments, p. 82. That means that, before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained."

Here again, I am quite certain that by "unlawfully detained", the Lord Chief Justice meant physically detained.

In England, the only instance in which a person has a right to apply for the writ of *habeas corpus* when on bail is when the *habeas corpus* proceedings arise out of orders for the extradition or rendition of fugitive offenders. This is by virtue of the statutory provisions of section 11 of the Extradition Act, 1870, and section 5 of the Fugitive Offenders Act, 1881. The latter Act has now been repealed by the Fugitive Offenders Act, 1967, which has retained under section 8, the right of the fugitive to apply for a writ of *habeas corpus*. This right is not affected by the fact that the fugitive has been released on bail pending his return, and is consequently under no immediate personal restraint. The magistrate who commits a fugitive offender to prison with a view to his return under the Fugitive Offenders Act, must inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. The right of a fugitive offender on bail to apply for a *habeas corpus* was considered in *R.* v. *Spilsbury*[7] where Lord Russell of Killowen C.J. expressed the following opinion, at page 621:—

"..... Therefore, forming the best judgment I can, I am of opinion that this court has the power to admit a defendant to bail in such a case as the present. Mr. Sutton put this point: supposing a defendant, being committed by the magistrate, is admitted to bail by this court, how is he to apply for a *habeas corpus*, seeing that he is already at large? I think there is really nothing in the point. He could apply for a *habeas corpus* before he was released on bail, but the language of s. 5 of the Act is conclusive. That section provides that 'where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*, or other like process.' These concluding words shew that, if the fugitive is committed to prison, he may apply for a writ of *habeas corpus*, or other like process, on grounds which go to the validity of the order for his return, and he would have the same right to apply if he were released on bail ....."

It is quite clear from the above that a fugitive offender on bail has the right to apply for a writ of *habeas corpus* when and only when an order for his return has been made, and that this right flows from the express statutory provisions of the Fugitive Offenders Act. Similar provisions exist in section 12(1) of our Extradition Act, 1968 (No. 14 of 1968) and there are in this Act, special provisions relating to extradition to and from Malaysia. Under section 37 of the Extradition Act, when a person apprehended is dissatisfied with an order made by a magistrate for his return to Malaysia, the apprehended person may apply to the High Court for a review of the order, and the court may review the order. The application before me is not made under section 37 of the Extradition Act and in the circumstances of this case it cannot be made under that section because the magistrate has not made any order for the return of the applicant to Malaysia.

The right of a person on bail to apply for *habeas corpus* was examined and dealt with exhaustively by the Supreme Court of Canada in *Re Isbell*[8] where it was held that *habeas corpus* is only appropriate where the applicant is in actual confinement and that if he is already out on bail, the remedy is not appropriate. The applicability of the doctrine of constructive custody in *habeas corpus* was examined and rejected by the court. Rinfret J. said at page 393:—

"..... there is, to my mind, a preponderating objection against the issue of the writ: The prisoner is on bail.

Blackstone in his Commentaries (3 Lewis ed., p. 1127) dealing with the common law writ of *habeas corpus* says:— 'The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with day and cause of his caption and detention ..... to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.'

There is a passage in 3 *Hawkins'* Pleas of the Crown, 7th ed., p. 186, to the effect:— 'That the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler.'

I do not think however that, generally speaking, a person discharged on bail may be considered as restrained of his liberty for the 'purpose' of entitling him to a writ of *habeas corpus*.

I was referred to a sentence in Lord Campbell's judgment in *Fozall* v. *Barnett*, where he says:— 'The plaintiff was released only from imprisonment within four walls: he still had to restore himself to a state of freedom; which he did not do until he had the inquisition set aside: till then the imprisonment was not done away with.' But this was in an action for false imprisonment, where the 'inquisition' was quashed on *certiorari;* and the question was whether plaintiff was entitled, under an allegation that he had incurred expenses in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition. Having regard to the nature of the case, I would interpret the words of Lord Campbell as meaning that, until the 'inquisition was set aside,' the plaintiff was threatened with imprisonment and any expense incurred for the purpose of 'doing away with' it was justifiably incurred.

The only decision in the Canadian Courts that I have been able to find, and I was referred to no other, is that of *Reg.* v. *Cameron*, but there the petitioner was a physician who resided in the Province of British Columbia. He was arrested in that province and brought to Montreal, in the Province of Quebec, to answer a charge of defamatory libel. When he was committed for trial, the judge admitted him to bail to appear at the November term of the Court of Queen's Bench, 'and in the meantime not to depart the court without leave.' He had not therefore the privilege of going when and where he pleased. No bill of indictment was preferred against him during the two next ensuing terms of the court. He then moved under a special provision of the statute of Lower Canada (an Act respecting the writ of *Habeas Corpus*, C.S.L.C. 1861, c. 95, s. 7) that his bondsmen be released, and that the recognizance entered into by them and himself be discharged and vacated. The provision of the Act was that when a person has been committed for a felony and, having prayed to be brought to trial, is not indicted during the next term of the Court of Queen's Bench after such commitment, the court shall, upon motion made in open court, set the prisoner at liberty upon bail, unless it be shown that the witnesses could not be procured for that term, and, after having asked to be brought to trial, if he be not indicted and tried at the second term after his commitment, that he be discharged from his imprisonment.

Wurtele, J., granted the motion and discharged the prisoner. In so doing he used the following language, 1 Can. C.C., at p. 170:— 'But bail is custody and he is constructively in goal; and he has the same right to be released from this custody as he would have to be released from an imprisonment.' The judge was addressing himself to the question whether the section applied notwithstanding the fact that the petitioner was not actually in jail and he came to the conclusion that it did. He held that, under the section, a person, who was not indicted and tried for two consecutive terms after his commitment, had an equal 'right to be released' whether in prison or under bail. The decision turned exclusively upon the construction of the statute and the very exceptional circumstances of the case.

In my view, in order to make a case for *habeas corpus* in criminal matters there must be an actual confinement or, at least, the present means of enforcing it. A person may apply while in the custody of a constable, immediately upon being arrested, and need

not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ. There are numerous decisions in that sense in the U.S. They may be found conveniently collected in 15 A. & E. Enc., 2nd ed., p. 159.

At present, the prisoner is at liberty on bail. He has himself selected that means of avoiding confinement and incarceration. He is on bail on his own application since November, 1928. We are now in May, 1929, and his trial is now proceeding in Toronto.

I should not interfere. The application is dismissed without costs."

In *Ex parte Seriesky*[9] another Canadian case, a bench of six judges of the Supreme Court of New Brunswick (Barker C.J., Landry, McLeod, White, Barry, and McKeown JJ.) held that a writ of *habeas corpus* will not be granted when the accused has obtained a release on bail and that *habeas corpus* is intended to give relief only to persons in actual custody under illegal process. The opinion of the court was delivered by White J. who said, at page 613:—

"From the statement of the learned counsel and the papers before us it appeared that at the time the application was made Seriesky was not in custody. It appeared that the information having been laid before the stipendiary magistrate mentioned, a warrant was issued and Seriesky arrested thereunder, and thereupon proceedings were had in pretended compliance with the provisions of section 5 of the Bastardy Act, C.S.N.B., 1903, ch. 182. The magistrate having refused to discharge the prisoner as the result of that examination, Seriesky entered into the recognizance provided for by the Act, with sureties as thereby provided, and was thereupon released from arrest, and was not under arrest when the application was made to this court.

It is quite clear, therefore, that a writ of *habeas corpus cum causa* could not be granted by the court, because that is a writ intended to give relief to persons who are in custody and to secure their release from a custody which is illegal. If the writ were granted, directed to some officer, to bring in the body of Seriesky, the first proceeding thereunder necessarily would be to arrest Seriesky and bring him before the court. Therefore, I say the application as to *habeas corpus* must fail....."

There are two other Canadian cases in which it has been held that a person on bail is not entitled to *habeas corpus* and they are *Re Bhagwan Singh*[10] and *Verrault* v. *Lachance*.[11]

Quite apart from the abovementioned authorities which show that an accused person on bail is not entitled to a writ of *habeas corpus*, the right of a person on bail to apply for *habeas corpus* cannot be justified on principle. When a person is charged in a magistrate's court with any offence and released on bail, all questions relating to the validity of the charge or the jurisdiction of the court must in the first instance be decided by the magistrate's court and if the accused is dissatisfied with the decision of that court, he may, at the conclusion of the proceedings in that court, appeal against that decision to the High Court. It is fundamental that the decision of the magistrate's court in those circumstances can be examined by the High Court only on appeal or revision. There is no question of *habeas corpus* being available to the accused in such circumstances. If it were otherwise, then it would be open to every person charged in a magistrate's court and released on bail, to apply for a writ of *habeas corpus* to challenge the validity of the charge or the jurisdiction of the court and this would result in such questions being determined by the High Court in the first instance instead of by the magistrate's court. It would lay the door open to every accused person for by-passing the magistrate's court altogether.

Even in the case of a fugitive, when he is produced in a magistrate's court in Singapore for having committed an offence abroad against the laws of a foreign State, as in the present case, submissions as to the validity of the proceedings or the jurisdiction of the court should be made to the magistrate's court in the first instance. The magistrate's court, upon hearing such submissions, may make any of the following orders:—

(1) An order discharging the accused person.

(2) An order committing the accused person to prison or otherwise to be held in custody to await his surrender to the foreign State in which case the accused person may apply for a writ of *habeas corpus* under section 12 of the Extradition Act, 1968.

(3) In the case of a person accused of having committed an offence in Malaysia, an order that the accused person be surrendered to Malaysia, in which case, the accused person may apply to the High Court under section 37 of the Extradition Act 1968 for a revision of that order.

In the present case the magistrate's court has not made any of these orders. It is alleged that the Deputy Public Prosecutor applied to the magistrate's court for the return of the applicant to Malaysia under the provisions of section 54 of the Criminal Procedure Code and that this application was adjourned on the request of counsel for the applicant to enable the applicant to commence these *habeas corpus* proceedings. In my opinion it was wrong on the part of the magistrate's court to adjourn the proceedings for such purpose. The magistrate's court, after hearing the evidence tendered and the submissions made by both sides, should have either made an order discharging the applicant or an order for his return to Malaysia. Had the magistrate made the latter order, the applicant, if dissatisfied with such order, could have asked for a stay of the order under section 294 of the Criminal Procedure Code and appealed to the High Court against that order. As the magistrate has not made any such order

and as the proceedings in the magistrate's court have not been concluded, and the applicant is on bail, he has no means of challenging the validity of those proceedings.

Had the applicant been in actual custody, and not on bail, he would have been entitled to apply for a writ of *habeas corpus* under section 375 (a) of the Criminal Procedure Code. He can of course surrender to his bail, and upon being remanded in custody, make a fresh application for a writ of *habeas corpus*. If he prefers to remain on bail, then the only way in which this matter can be resolved is for him to go back to the Ninth Magistrate's Court and request that court to conclude the proceedings before it by making any one of the orders already indicated which in the wisdom of that court is most appropriate in the light of the facts proved and the submissions made. If the Ninth Magistrate's Court makes an order under the Extradition Act, 1968, for the surrender of the applicant to Malaysia, the applicant may in that case ask the High Court to review that order under section 37 of the said Act. On the other hand if the Ninth Magistrate's Court makes an order for the return of the applicant to Malaysia under section 54 of the Criminal Procedure Code, the applicant may appeal against that order to the High Court under section 290 of the Criminal Procedure Code.

Mr. Marshall submits that if this court holds that the applicant is not entitled to the writ of *habeas corpus* under section 375(b) of the Criminal Procedure Code, then he would invoke section 375(c) of the Criminal Procedure Code under which the applicant is in his submission clearly entitled to the writ. Section 375(c) reads as follows:—

> "375. Any person:—
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) who claims to be brought before the court to be dealt with according to law,
>
> may apply to the High Court for a writ of *habeas corpus*."

In my opinion this submission must also fail. The expression "who claims to be brought before the court" refers to a person who is in actual custody and who claims the right to be brought before the court to be dealt with according to law e.g. a defendant in custody under a writ of attachment. Such a person can claim to be brought before the court to be dealt with according to law. It does not mean that any person can claim to be brought before the court. If that were so then every person who desired the opinion of the High Court on some question or matter could "claim to be brought before the court to be dealt with according to law." I have no doubt at all that only a person in actual custody whose case is not covered by paragraphs (a) and (b) can claim the right to be brought before the High Court because "brought before the court" means brought from actual custody.

In my judgment it is fundamental, that in the absence of any statutory provision enabling him so to do, an applicant for a writ of *habeas corpus*, who is out on bail, is not entitled to apply for this writ.

For these reasons, in my opinion, this application for a writ of *habeas corpus* is misconceived and it is therefore dismissed.

Application dismissed.

RE CHAI KAI WOOI

[O.C.J. (Chang Min Tat J.) August 4, 1969]
[Ipoh — Petition for Admission No. 82 of 1968]

Advocates and Solicitors — Admission — Reading in chambers — Application for shortening period of — Special grounds — Reading in chambers before call to English Bar — Whether acceptable for the purpose of Advocates and Solicitors Ordinance, 1947, s. 5(3)(c).

The petitioner applied for shortening of the period of reading in chambers. He had read as a barrister for 8 months only and sought to shorten the period by some 4 months. The reason given for the application was that by some mishap in processing the results of oversea examinees in the May 1968 examinations, the success of the applicant was not communicated to him in time to entitle him to arrange his call to the English Bar in the Trinity 1968 term and he was in fact not called until the Michaelmas 1968 term some 4 months later.

Held: there were no special grounds in this case for granting the application.

Cases referred to:—

(1) *In Re Ahmad bin Mohamed Ibrahim* (1946), 2 M.C. 201.

(2) *In Re K.T.K. Tangamani* [1948] M.L.J. 101.

(3) *In Re Kim Chwee Chia* [1947] M.L.J. 108.

(4) *In Re Hussein bin Onn* [1962] M.L.J. 244.

(5) *In Re Chan Sek Keong* [1962] M.L.J. 88.

PETITION FOR ADMISSION.

Ng Chee Kong for the applicant/petitioner.

K.A. Menon for the Bar Council.

M. Moganasundram for the Bar Committee, Perak.

M. Mahalingam (Deputy Public Prosecutor) for the Attorney-General.

Cur. Adv. Vult.

Chang Min Tat J.: By notice of motion, the applicant applies for an order that (and here I quote the words of the notice):—

> "The period be shortened to the 19th day of July 1969 in compliance with section 5(3)(c) of the Advocates and Solicitors Ordinance."